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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

10 Martin Lopez-Heredia,) No. CIV 08-349-PHX-DGC (GEE)
11 Petitioner,) **REPORT AND RECOMMENDATION**
12 vs.)
13 Katrina S. Kane, Field Office Director,)
14 Immigration and Customs Enforcement; et)
14 al.,)
15 Respondents.)
16 _____)

17 Pending before the court is a Petition for Writ of Habeas Corpus filed by Martin Lopez-
18 Heredia on February 22, 2008, pursuant to Title 28, United States Code, Section 2241. The
19 petitioner argues his current detention while in removal proceedings is contrary to law.
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21 Within the petition, Lopez-Heredia moves for a preliminary injunction and a temporary
22 restraining order granting his release.

23 The respondents filed a response to the petitioner's motions, and Lopez-Heredia filed a
24 reply. The court ordered service of the petition on May 5, 2008. The respondents filed an
25 answer and a supplementary response to the petitioner's motions on July 14, 2008. The
26 petitioner filed a reply on August 25, 2008.

27 Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate
28 Judge Edmonds for a Report and Recommendation.

1 The Magistrate Judge recommends that the District Court, after its independent review
 2 of the record, grant the petition. Lopez-Heredia's current detention is not authorized by law.
 3 *See Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005). His motions should be denied as moot
 4 because they ask for the same relief as his petition.

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6 Summary of the Case

7 Lopez-Heredia is a native and citizen of Mexico. (Respondents' answer, p. 1.) He
 8 entered the country as an immigrant on July 11, 1975. *Id.* On July 16, 1996, Lopez-Heredia
 9 was convicted of "Using/Being Under the Influence of a Controlled Substance, to wit: Cocaine"
 10 in violation of California law. *Id.*

11 On September 27, 1996, the government issued Lopez-Heredia an Order to Show Cause
 12 alleging he was subject to deportation because he was convicted of a controlled substance
 13 offense pursuant to INA § 241(a)(2)(B)(i) (8 U.S.C. § 1251(a)(2)(B)(i) (1994)) (currently
 14 renumbered as INA § 237(a)(2)(B)(i) (8 U.S.C. § 1227(a)(2)(B)(i))). *Id.*, pp. 1-2.

15 Though initially denied bond, Lopez-Heredia was later granted bond in the amount of
 16 \$1,500 by the immigration court. *Id.*, p. 2.

17 On November 14, 1999, Lopez-Heredia appeared before an Immigration Judge (IJ). *Id.*
 18 He conceded deportability but expressed his intention to move for waiver under INA §212(c).
 19 *Id.* At the subsequent hearing on January 15, 1999, the parties agreed to terminate deportation
 20 proceeding and commence removal proceedings under the newly effective Illegal Immigration
 21 Reform and Immigrant Responsibility Act (IIRIRA). *Id.*

22 On October 4, 2000, the government issued Lopez-Heredia a Notice to Appear again
 23 alleging deportability pursuant to INA § 241(a)(2)(B)(i). *Id.* Lopez-Heredia again was
 24 released on \$1,500 bond. *Id.*

25 On March 29, 2006, Lopez-Heredia was convicted of "Possession of Drug
 26 Paraphernalia" in violation of Arizona law. *Id.* He was placed into custody on July 28, 2006,
 27 and held without bond pursuant to INA § 236, 8 U.S.C. § 1226(c). *Id.*

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1 On September 26, 2006, Lopez-Heredia appeared before an IJ. *Id.* The government
 2 amended its allegation to include Lopez-Heredia's latest conviction. *Id.* Lopez-Heredia
 3 conceded the government's allegations and submitted his applications for relief under INA §
 4 212(c) and cancellation of removal. *Id.*

5 On February 8, 2007, the IJ issued a decision sustaining the charge of deportability,
 6 denying the applications for relief, and ordering Lopez-Heredia removed to Mexico. *Id.*, p. 3.

7 Lopez-Heredia filed a Notice of Appeal with the Board of Immigration Appeals (BIA).
 8 *Id.* While the appeal was pending, he filed a motion to reopen. *Id.* The BIA dismissed his
 9 appeal and motion on May 17, 2007. *Id.*, p. 4.

10 Lopez-Heredia filed a petition for review and motion for stay with the Ninth Circuit
 11 Court of Appeals. *Id.* His removal was automatically stayed. <https://ecf.ca9.uscourts.gov/cmecf/doc. #07-71976>. While the appeal was pending, he filed a motion to reconsider with the BIA.
 12 (Respondents' answer, p. 4.) The BIA denied the motion, and Lopez-Heredia filed a second
 13 petition for review with the Ninth Circuit Court of Appeals. *Id.* The two petitions were
 14 consolidated on December 24, 2007. *Id.* His appeal remains pending. *Id.*

15 On February 22, 2008, Lopez-Heredia, filed the instant petition for writ of habeas
 16 corpus. He argues his continued detention is contrary to law citing, *inter alia*, *Tijani v. Willis*,
 17 430 F.3d 1241 (9th Cir. 2005). (Petition.) Within the petition, Lopez-Heredia moves for a
 18 preliminary injunction and a temporary restraining order granting his release. *Id.* He argues
 19 he is entitled to immediate release pending the resolution of the petition. *Id.* The respondents
 20 filed an answer on July 14, 2008. Lopez-Heredia filed a reply on August 25, 2008.

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Discussion

23 Lopez-Heredia is being held pursuant to 8 U.S.C. § 1226. This statute governs the initial
 24 apprehension and detention of aliens to determine whether they should be removed from the
 25 United States. Section 1226(c) requires the detention of certain classes of aliens, notably those
 26 aliens who have been convicted of certain controlled substance offenses. (Respondents' answer,
 27 p. 4, n. 4.)

1 Section 1226 governs the alien's detention until the start of the "removal period," which
 2 is described in section 1231. This later statute governs the detention and eventual removal of
 3 the alien. *See* 8 U.S.C. § 1231.

4 The "removal period" ordinarily begins on "[t]he date the order of removal becomes
 5 administratively final." 8 U.S.C. § 1231(a)(1)(B)(i). If the alien files an appeal and the court
 6 of appeals orders a stay of removal, the removal period begins on "the date of the court's final
 7 order." 8 U.S.C. § 1231(a)(1)(B)(ii).

8 In this case, Lopez-Heredia filed an appeal and the court of appeals ordered a stay of
 9 removal. Accordingly, the removal period has not yet begun and § 1226 still applies. *See*
 10 *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008).

11 The government argues Lopez-Heredia's detention is proper pursuant to § 1226(c). This
 12 section, however, only authorizes detention during "expedited" removal proceedings. *Tijani*
 13 *v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005); *See also Demore v. Kim*, 538 U.S. 510, 529
 14 (2003) ("The Executive Office for Immigration Review has calculated that, in 85% of the cases
 15 in which aliens are detained pursuant to § 1226(c), removal proceedings are completed in an
 16 average time of 47 days and a median of 30 days."). These proceedings ended when the BIA
 17 dismissed his appeal. *See Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942
 18 (9th Cir. 2008). After that point, § 1226(c) no longer applied. *Id.*

19 The Ninth Circuit recently reconsidered this statutory detention scheme and concluded
 20 that when detention is no longer authorized by § 1226(c), the government retains discretionary
 21 authority to detain an alien pursuant to § 1226(a). *Casas-Castrillon v. Department of Homeland*
 22 *Security*, 535 F.3d 942 (9th Cir. 2008). The government's power to detain, however, is not
 23 without Constitutional limitation. *Id.* Prolonged detention is permissible only if "the
 24 government establishes [the alien] is a flight risk or will be a danger to the community." *Id.*
 25 If it cannot, the alien is entitled to release on bond. *Id.*

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1 Recommendation

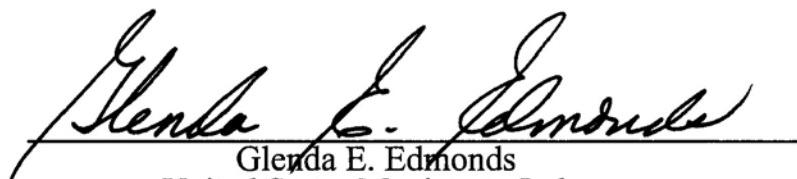
2 The Magistrate Judge recommends that the District Court, after its independent review
3 of the record, grant the Petition for Writ of Habeas Corpus filed on February 22, 2008, “unless
4 the government within 60 days [of the District Court’s order] provides a hearing to [the
5 petitioner] before an Immigration Judge with the power to grant him bail unless the government
6 establishes that he is a flight risk or will be a danger to the community.” *Tijani*, 430 F.3d at
7 1242.

8 The petitioner’s motion for a preliminary injunction and temporary restraining order
9 incorporated into his petition should be denied as moot.

10 Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections within
11 10 days of being served with a copy of this Report and Recommendation. If objections are not
12 timely filed, the party’s right to de novo review may be waived. *See United States v. Reyna-*
13 *Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 900 (2003).

14 The Clerk is directed to send a copy of this Report and Recommendation to the petitioner
15 and the respondents.

16 DATED this 4th day of September, 2008.

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21 Glenda E. Edmonds
22 United States Magistrate Judge
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